Tentative Rulings for October 26, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

16CECG00229 ***Camarena v. Zborowski et al.*** **(Dept. 503)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

16CECG01615 ***May Vang vs Two Jinn, Inc.*** **is continued to Wednesday, November 9, 2016 at 3:30 p.m. in Dept. 402.**

15CECG00160 ***Gonzalez et al. v. Lopez et al.*** **is continued to Wednesday, November 9, 2016 at 3:30 p.m. in Dept. 503.**

14CECG01472 ***Gill v. Fresno Community Hospital and Medical Center*** **is continued to Tuesday, November 22, 2016 at 3:30 p.m. in Dept. 402.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(30)

Tentative Ruling

Re: ***The Best Service Co. Inc. v. Todd Spencer***
Superior Court No. 16CECG01335

Hearing Date: Wednesday October 26, 2016 (**Dept. 402**)

Motion: Defendant Todd Spencer's Motion to Compel

Tentative Ruling:

To **Order** Defendant Spencer's motion to compel form interrogatories set one and special interrogatories set one off calendar.

To **Deny** Defendant Spencer's motion to production of documents set one.

To **Impose** sanctions in the amount of $840 against Attorney Kevin Kump. (Codes Civ. Proc. §§ 2023.030 subd. (a); 2030.290 subd. (c).) Sanctions must be paid within 60 days.

Explanation:

Motion to Compel- Form and Special Interrogatories

An action that originally was based on a justiciable controversy cannot be maintained if all the questions have become **moot** by subsequent acts or events. Judgment would be without practical effect, and cannot therefore proceed. As the court said in *Consolidated Vultee Aircraft Corp. v. United Auto., Aircraft & Agricultural Implement Workers* (1946) 27 Cal.2d 859, quoting from a United States Supreme Court decision: "[W]hen, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." (*ibid.*)

Here, Defendant moves for an order compelling answers to form and special interrogatories, sets one. However, on October 14, 2016, Plaintiff served the answers to the interrogatories *without* objection. (Kump Dec, filed 10/18/16 ¶ 5.) Therefore, Defendant's motion is moot. Motion is ordered off calendar.

Motion to Compel – Request for Production of Documents set one

A notice of motion must state the nature of the order being sought and the grounds for issuance of such order. This information must appear in the first paragraph of the notice. (*Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1125; *Sole Energy Co. v. Hodges* (2005) 128 Cal.App.4th 199, 207; Code Civ. Proc. § 1010; Cal. Rules of Court, rule 3.1110(a).)

Here, Defendant's notice of motion does *not* include a request for production of documents. Therefore, it cannot be considered. (Betts Dec, filed 9/27/16 Ex. B.) Motion denied.

Sanctions

Failing to respond or to submit to an authorized method of discovery is a misuse of the discovery process. Where the court finds a misuse of the discovery process, it may, after notice to the impacted party and opportunity for hearing, impose a monetary sanction ordering the person engaging in such misuse, or any attorney advising such conduct, or both, to pay the reasonable expenses, including attorney's fees, incurred by the other party as a result of the offending party's behavior. (Code Civ. Proc., §§ 2023.010, 2023.030; *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 Cal.App.4th 256, 262.) Further, the court shall impose a monetary sanction against the party opposing the motion to compel *unless* it finds that party acted "with substantial justification" or other circumstances render the sanction "unjust." (Code of Civ. Proc. §2030.290, subd.(c).)

Here, Defendant's Attorney James Betts requests $860 to $1,460 in sanctions. (Betts Dec, filed: 9/27/16 ¶ 5.) He bills at $400 per hour: he spent two hours preparing the motion ($800); he requests $60 for the filing fee; and he anticipates 1.5 additional hours for the hearing ($600). (*Ibid*.) Everything is reasonable except the extra 1.5 hours. Requests for answers are unopposed, so there is no justification for additional sanctions. Sanctions are imposed in the amount of $860.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 10/24/16

(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Nalbandian v. Selma Unified School District***
Superior Court Case No.: 15CECG01735

Hearing Date: October 26, 2016 (**Dept. 402**)

Motion: Motion for summary judgment or, in the alternative, summary adjudication, by Defendant Selma Unified School District

Tentative Ruling:

To deny. The evidentiary objections are overruled.

Evidence and "reply separate statements" submitted with the reply will not be considered. There is no statutory provision permitting supplemental separate statements or additional evidence to be filed with the reply. (Code Civ. Proc. § 437c, subd. (b)(4); *San Diego Watercrafts v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 312-316.) The court will consider only those facts contained in the parties' separate statements. (*Mills v. Forestex* (2003) 108 Cal.App.4th 625, 640-641.) The documents filed by Defendant Selma Unified School District on October 4, 2016, are disregarded by the Court because they were not filed 75 days before the hearing. (Code Civ. Proc., § 437c, subd. (a); Cal. Rules of Court, rule 3.1300(d).)

Explanation:

Analysis of a motion for summary judgment or summary adjudication is a three-step process. First, the court identifies the issues framed by the pleadings since it is these allegations to which the motion must respond. Second, the court determines whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in the moving party's favor. When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable issue of material fact. (*Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 503; Chevron U.S.A., Inc. v. Superior Court (1992) 4 Cal.App.4th 544, 548.)

California Rules of Court, rule 3.1350(b) provides in relevant part [emphasis added]: "If summary adjudication is sought, whether separately or as an alternative to the motion for summary judgment, the <u>specific</u> cause of action, affirmative defense, claims for damages, or issues of duty must be stated <u>specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts.</u>"

California Rules of Court, rule 3.1350(d) provides in relevant part [emphasis added]: "The Separate Statement of Undisputed Material Facts in support of a motion must <u>separately identify</u> each cause of action, claim, issue of duty, or affirmative

defense, and each supporting material fact claimed to be without dispute with respect to the cause of action, claim, issue of duty, or affirmative defense."

The failure to comply with California Rules of Court, rule 3.1350, means that the motion for summary adjudication must be denied.

As to the motion for summary judgment, the court's sole function on a motion for summary judgment is issue-finding, not issue-determination. (Code Civ. Proc., § 437c, subd. (c); *Zavala v. Arce* (1997) 58 Cal.App.4th 915, 926.)If there is one, single material fact in dispute, a motion for summary judgment must be denied. (*Versa Technologies, Inc. v. Superior Court* (1978) 78 Cal.App.3d 237, 240.)

Facts #21 and 54 are both disputed. Fact #21 is that on February 24, 2014, Plaintiff was placed on leave from Defendant school district for the remainder of the 2013-2014 school year, with evidence that Plaintiff was provided a release to work by her health care provider on May 14, 2014. Thereafter, she says she contacted Ms. Wood about returning to work, and Ms. Wood stated she would work with Mr. Dixon and Mr. Teixeira to get her back to work as soon as possible; however, Ms. Wood never responded before the end of the year. (Decl. of Laurie Nalbandian, ¶¶24-25, exhibit 1 to appendix of exhibits.) Fact #54, that Plaintiff's doctor allegedly released her to return to work on June 4, 2014, is also disputed with evidence that Plaintiff was provided a release to work by her health care provider on May 14, 2014. Thereafter, she says she contacted Ms. Wood about returning to work, and Ms. Wood stated she would work with Mr. Dixon and Mr. Teixeira to get her back to work as soon as possible; however, Ms. Wood never responded before the end of the year. (Decl. of Laurie Nalbandian, ¶¶24-25, exhibit 1 to appendix of exhibits; e-mail exchange with Teresa Wood dated May 13-15, 2014, exhibit 13.)

If Defendant contended that Plaintiff does not suffer from a FEHA-protected disability, there are no facts in the separate statement that bear this out. If Defendant contended that there was "no evidence" to support certain claims, it was incumbent on Defendant to present facts that there was no evidence. "Summary judgment law in this state … continues to require a defendant moving for summary judgment to present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. … The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence—as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Aguilar v. Atlantic Richfield Company* (2001) 25 Cal.4th 826, 854–855, fn. omitted.) The reason is that the statutory language requires that the motion be "supported" by evidence. (*Id.* at pp. 854-855.)

The motion is denied.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order

adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 10/24/16

(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***United Hmong Council, Inc. v. Hmong International New Year Foundation, Inc., et al.***
Court Case No. 11 CECG 04276

Hearing Date: October 26, 2016 (Dept. 402)

Motion: Defendants' Motion to Amend Judgment

Tentative Ruling:

To grant. The May 13, 2016 Judgment's reference to this Court's prior "Findings on Order to Show Cause re Contempt and Judgment of Contempt of Court" being filed on August 30, 2015, is corrected to August 31, 2015. Moreover, the Judgment's citation to Code of Civil Procedure section 138, is corrected to section 128, nunc pro tunc as of May 13, 2016. The court will sign defendants' proposed Order.

Explanation:

Code of Civil Procedure section 473 authorizes the court to correct clerical errors: "[t]he court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed …" (Code Civ. Proc., § 473, subd. (d).) The order of correction is generally made nunc pro tunc to the time of the original entry of judgment. (See *Commonwealth Land Title Co. v Kornbluth* (1985) 175 Cal.App.3d 518, 531.)

The judge may correct "clerical" but not "judicial" errors by this procedure. The difference between a judicial error and a clerical error does not depend on the person who committed the error, but on whether the error was the deliberate result of judicial reasoning and determination. (*Rochin v Pat Johnson Mfg. Co*. (1998) 67 Cal.App.4th 1228, 1238.) A "clerical error" results when the order or judgment as entered inadvertently misstates the court's actual intent—i.e., when the error is in recording the court's intended judgment. (*Bell v. Farmers Ins. Exch*. (2006) 135 Cal.App.4th 1138, 1144.) "Judicial error," on the other hand, results when the order or judgment entered was intended—i.e., the deliberate result of judicial reasoning—although based on an error of law. A judge cannot amend a judgment to substantially modify it or materially alter the parties' rights. (*Id*. at p. 1237-1238.)

However, misstatements resulting in references to the wrong statute and date are clerical errors and may be corrected. (*People v. Reddick* (1959) 176 Cal.App.2d 806, 820 [wrong number of Penal Code section]; *Ex parte Donovan* (1950) 96 Cal.App.2d 693, 699 [commitment for contempt of court had incorrect date of judgment finding petitioner guilt of contempt, correction proper]

A judge's power to correct clerical errors is not affected by a pending appeal. (*People v Alanis* (2008) 158 Cal.App.4th 1467, 1473-1474.)

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 10/25/16

(Judge's initials) (Date)

(2)

Tentative Ruling

Re: ***In re Pa'Mir Olivier***
Superior Court Number: 16CECG02866

Hearing Date: October 26, 2016 (Dept. 402)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. Order signed. Hearing off calendar.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 10/25/16
(Judge's initials) (Date)

Tentative Rulings for Department 403

(30)

Tentative Ruling

Re: ***Sheri McGovern v. Stephanie Bradshaw***
Superior Court Case No. 15CECG00262

Hearing Date: Wednesday October 26, 2016 (**Dept. 403**)

Motion: Default Hearing

Tentative Ruling:

To Deny.

Explanation:

Damages
The normal measure of damages is the *full fair market value* of the property, plus interest. (Civ. Code § 3336; *Lueter v. State of Calif.* (2002) 94 Cal.App.4th 1285, 1302.) However, the Court is required to render default judgment only "for that relief … as appears by the evidence to be just." (Code Civ. Proc., § 585, subd. (b).) Therefore, it is up to plaintiff to "prove up" the right to relief, by introducing sufficient evidence to support his or her claim. Without such evidence, the court may refuse to grant a default judgment for any amount, notwithstanding defendant's default. (*Taliaferro v. Hoogs* (1963) 219 Cal.App.2d 559, 560; *Holloway v. Quetel* (2015) 242 Cal.App.4th 1425, 1434-1435.)

Here, Plaintiff presents no evidence justifying damages. Plaintiff prays for $ 25,000 in damages (Complaint, ¶ 6), but does not explain how she arrived at that number. Upon resubmission, Plaintiff must submit evidence and calculations justifying damages.

Punitive Damages
Punitive damages are available where plaintiff shows by clear and convincing evidence that defendant was guilty of oppression, fraud or malice. (Civ. Code § 3294, subd. (a); *Krieger v. Pacific Gas & Elec. Co.* (1981) 119 Cal.App.3d 137, 148.)

Here, Plaintiff prays for punitive damages (Complaint, ¶ 7), but alleges insufficient facts to adequately assert that *more probably than not*, Defendants were guilty of oppression, fraud or malice. Plaintiff's allegations that Defendants "have refused to return the Plaintiffs personal possession [sic]," or that Defendants, "acted with the intent to harm," or "with full knowledge that their actions were wrong," are merely legal conclusions which do not amount to oppression, fraud, or malice. (Complaint, ¶ 5; see *Careau & Co. v. Security Pac. Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1390.) Upon resubmission, Plaintiff must amend her complaint to include supporting facts or this request must be removed.

Code of Civil Procedure section 585 Declaration
Fresno County Superior Court prefers to hear default prove-ups via declaration. (Superior Court of Fresno County Local Rules, rule 2.1.14.)

Here, Plaintiff fails to submit *any* supporting declaration. Upon resubmission, Plaintiff must submit a declaration, prior to the hearing, which conforms to Code of Civil Procedure section 585. (Superior Court of Fresno County Local Rules, rule 2.1.14.)

Writ of Possession
If a plaintiff wishes to recover the property itself—as opposed to receiving its fair market value, the proper remedy is claim and delivery. (Civ. Code § 3379.) It requires a writ of possession which must be filed using form CD-100.

Here, if Plaintiff seeks repossession, she must file the required application (CD-100). Claim and delivery is not available via default judgment.

CIV-100
A plaintiff that seeks a default judgment when the defendant has not responded to the complaint within the time for doing so must first submit the Judicial Council form CIV-100, Request for Court Judgment. Use of this form is mandatory. (*Simke, Chodos, Silberfeld & Anteau, Inc. v Athans* (2011) 195 Cal.App.4th 1275, 1287.)

Here, Plaintiff has not submitted form CIV-100; it must be submitted prior to judgment.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 10/24/16
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Garcia v. Clark, et al.***
Court Case No. 16 CECG 00932

Hearing Date: October 26, 2016 (Dept. 403)

Motion: Default Prove Up

Tentative Ruling:

To deny without prejudice.

Explanation:

There are numerous procedural defects.

A cause of action for quiet title must be verified and include the following (see Code Civ. Proc. §761.020):

1) A description of the real property that is the subject of the action, including both the legal description and street address;
2) The title or interest of the plaintiffs as to which a determination is sought and the basis of the title;
3) The adverse claims to the title of the plaintiff against which a determination is sought;
4) The date as of which the determination is sought.
5) A prayer for determination of the title of the plaintiff against the adverse claims.

Here, the Complaint, which is not verified, is defective in several regards. First, the Complaint does not state what title or interest is sought by plaintiff. For example, is a fee simple interest, or some other interest sought? The prayer simply requests that plaintiff be declared the "owner," which is not a legal term of title. Nor does the complaint give a date as of which the title is sought.

Also, there is no evidence that a lis pendens and proof of service has been filed. " 'In California, a notice of lis pendens gives constructive notice that an action has been filed affecting title or right to possession of the real property described in the notice. [Citation.] Any taker of a subsequently created interest in that property takes his interest subject to the outcome of that litigation.' " (*Campbell v. Superior Court* (2005) 132 Cal.App.4th 904, 910–911, 34 Cal.Rptr.3d 68.) A lis pendens must be filed in a quiet title action. (Code Civ. Proc., § 761.010, subd. (b).)

Code of Civil Procedure section 405.22 provides that, before recording a lis pendens, the claimant must "cause a copy of the notice to be mailed, by registered or certified mail, return receipt requested, to all known addresses of the parties to whom

the real property claim is adverse and to all owners of record of the real property affected by the real property claim as shown by the latest county assessment roll. If there is no known address for service on an adverse party or owner, then as to that party or owner a declaration under penalty of perjury to that effect may be recorded instead of the proof of service required above, and the service on that party or owner shall not be required. Immediately following recordation, a copy of the notice shall also be filed with the court in which the action is pending."

Lastly, the unknown parties have not been served by publication. Code of Civil Procedure section 762.060 requires, in addition to alleging that persons required to be named as defendants were not known to plaintiff, that plaintiff include the following mandatory language to identify the class: " 'all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud upon plaintiff's title thereto', naming them in that manner." (Code Civ. Proc. §§ 762.020, subd. (a); 762.060, subd. (a).)

Plaintiff was required to submit an affidavit to the trial court, "that the plaintiff has used reasonable diligence to ascertain the identity and residence of and to serve summons on the persons named as unknown defendants ..." (Code Civ. Proc., § 763.010, subd. (b).)

Upon submission of the affidavit and satisfaction of the court, the trial court "shall *order service by publication* pursuant to Section 415.50 [of the Code of Civil Procedure] and the provisions of this article." (Emphasis added.) (Code Civ. Proc., § 763.010, subd. (b); Cal. Law Revision Com. com., 52 West's Ann. Code Civ. Proc. (2006 supp.) foil. § 763.010, ["Subdivision (b) makes clear that, where unknown parties or heirs are involved [in a quiet title action], service on such parties must be *by publication*"] (emphasis added); see also Code Civ. Proc., § 763.040.)

The "provisions of this article" regarding service by publication require that whenever the court orders service by publication, "[t]he plaintiff "shall post, not later than 10 days after the date the order is made, a copy of the summons and complaint in a conspicuous place on the real property that is the subject of this action." (Code Civ. Proc., § 763.020, subd. (a).) The actual publication must describe the property that is the subject of the action with particularity as set forth by statute. (Code Civ. Proc., § 763.020, subd. (c).)

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 10/25/16

(Judge's initials) (Date)

Tentative Rulings for Department 501

(29)

Tentative Ruling

Re: ***Robert Scott v. Gilbert Romero***
Superior Court Case No. 15CECG01564

Hearing Date: October 26, 2016 (Dept. 501)

Motion: Default hearing

Tentative Ruling:

To deny without prejudice.

Explanation:

No request for court judgment has been filed. This must be done on Judicial Council form CIV-100, and is a separate step from the application for default, even though the same form is used. (Code Civ. Proc. §585(b) ["The plaintiff [after entry of default by the clerk] may apply to the court for the relief demanded in the complaint."].) Without this form, the Court may not proceed with a default prove-up.

Also, Plaintiff has produced no supporting evidence for the judgment sought. (See *Taliaferro v. Hoogs* (1963) 219 Cal.App.2d 559, 560.) Fresno County Superior Court prefers to hear default prove-ups via declaration, even when a court judgment is sought. (See Superior Court of Fresno County Local Rules, rule 2.1.14.) When submitting a matter for default judgment on declarations, the parties must comply with California Rules of Court, rule 3.1800, and submit the required material together as a single packet. (Ibid.) Default packets should be filed with the Clerk's Office at least ten court days before the hearing. (Ibid.)

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 10/24/16
(Judge's initials) (Date)

(29)

Tentative Ruling

Re: ***Daniel Nieto v. Fresno Beverage Company, Inc., et al.***
Court Case No. 16CECG02614

Hearing Date: October 26, 2016

Motion: Petition to Compel Arbitration

Tentative Ruling:

To deny.

Explanation:

Unconscionability

Unconscionability has both a procedural and a substantive element, and each must be present in order to render a contract unenforceable. (*Stirlen v. Supercuts, Inc*. (1997) 51 Cal.App.4th 1519, 1532–1533.) For purposes of deciding whether to enforce an arbitration agreement, procedural unconscionability focuses on oppression or unfair surprise, such as is often present in contracts of adhesion, and substantive unconscionability focuses on overly harsh or one-sided terms. (*Dotson v. Amgen, Inc*. (2010) 181 Cal.App.4th 975; see *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 710 [where contract is adhesive and limits duties or liability of stronger party, it will not be enforced unless provisions are "conspicuous, plain and clear"]; *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1408 [finding of adhesiveness is not prerequisite to finding of unconscionability]; see also *Lane v. Francis Captial Management LLC* (2014) 224 Cal.App.4th 676, 689). Though both procedural and substantive unconscionability must be present to render an agreement unenforceable, they need not be present in the same degree; a "sliding scale" is used such that the more substantively unconscionable a contract term, the less evidence of procedural unconscionability need be presented to find the agreement unconscionable, and vice versa. (See *Armendariz v. Foundation Health Psychare Services, Inc*. (2000) 24 Cal.4th 83, 114; see also *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 910.)

As arbitration is intended to be a "streamlined procedure…[l]imitations on discovery, including the number of depositions" has been found to be "an integral and permissible part of the arbitration process." (*Dotson,* supra, 181 Cal.App.4th at p. 983.) Where an arbitration clause applies equally to the employer and employee, allowing each the same discovery procedures and remedies, the arbitration agreement is not substantively unconscionable. (*Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 246-247; see also *24 Hour Fitness,* supra*,* 66 Cal.App.4th 1199.) California courts generally enforce parties' agreements to a limitations period that is shorter than the applicable statutory limitation, provided that the shortened period is reasonable, meaning sufficient to effectively pursue a judicial remedy. (*Moreno v. Sanchez* (2003) 106 Cal.App.4th 1415, 1430.)

A party's failure to read or understand an arbitration clause in a contract he or she signs is generally not a defense to its enforcement. (*Madden v. Kaiser Foundation Hosptials* (1976) 17 Cal.3d 699, 710; *Bolanos v. Khalatian* (1991) 231 Cal.App.3d 1586, 1590.) "Reasonable diligence requires the reading of a contract before signing it. A party cannot use [his] own lack of diligence to avoid an arbitration agreement." (*Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 1674, internal quotation marks omitted.)

In the case at bench, Plaintiff alleges that the agreement at issue was presented on a take-it or leave-it basis, and that Plaintiff felt he had no choice but to take it, as he needed employment and no other appeared to be available. The contract was drafted by Defendant, who as the potential employer was clearly in a superior bargaining position. Plaintiff shows a lack of meaningful choice in that he had no other job prospects at the time, and was presented with the agreement by Defendant as a condition to employment. Plaintiff has sufficiently established the element of procedural unconscionability.

Plaintiff states that he can read and speak only limited English, that the employment agreement was entirely in English, none of the documents were translated into Spanish, no one explained to Plaintiff what the nature of the documents was, no one informed Plaintiff of the arbitration clause or explained to Plaintiff what an arbitration clause is, and that he was not given the opportunity to read and understand the large number of documents he was presented, because he was expected to complete the paperwork quickly so that he could begin working.

Plaintiff does not, however, state that he was in fact unable to understand the employment agreement presented by Defendant. Plaintiff provides no evidence that he requested a Spanish translation of the arbitration agreement, nor does Plaintiff allege that he asked Defendant if he could take the contract home or to an attorney to review, and was denied. Plaintiff provides no evidence that Defendant knew Plaintiff was unable to sufficiently read and understand the agreement, that Plaintiff was misled by a partial translation, or that Plaintiff would not have signed the employment agreement had a Spanish version been made available to him. Plaintiff argues that he did not understand he was waiving his rights to a jury trial, but provides no evidence that he could not reasonably have known that he was waiving his right to a jury trial. The provisions at issue were written in all capital letters and boldface font, they were not hidden or omitted. Plaintiff states that he was not provided an opportunity to negotiate the agreement, but does not state that he sought such opportunity and was denied same.

Plaintiff argues the limitation period is unconscionable because it is unreasonably short. The limitation period is one year from the end of the employment relationship or the occurrence of the alleged wrongful conduct. Plaintiff does not establish that a one year limitation period is substantively unconscionable in these circumstances, i.e., how Plaintiff could not reasonably have known that he was missing meal and rest periods and not being paid overtime wages within the one year timeframe provided in the agreement.

Plaintiff argues also that the denial of the right to amend, the confidentiality clause, limit on depositions, sequestration exemption and jury trial waiver make the agreement substantively unconscionable. Each of these provisions apply equally to Plaintiff and Defendant, supporting a finding that the agreement is not substantively unconscionable.

As both procedural and substantive unconscionability must be present to render the agreement unenforceable, and Plaintiff has not shown substantive unconscionability, the agreement is enforceable.

Federal Arbitration Act

The Federal Arbitration Act ("FAA") establishes a federal policy favoring arbitration, requiring that courts rigorously enforce agreements to arbitrate. (9 USC §§ 1–16; see *Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th 1105.) .) Generally, where a contract "evidenc[es] a transaction involving commerce", the FAA governs. (9 USC §1.) Courts must broadly construe the phrase "evidencing a transaction involving commerce," because the FAA "embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause." (*Perry v. Thomas* (1987) 482 U.S. 483, 490.)

Labor Code section 229 expressly authorizes suits for unpaid wages "without regard to the existence of any private agreement to arbitrate." In matters where the FAA applies, however, it preempts Labor Code section 229 and requires arbitration of claims that would otherwise be resolved in court. (*Perry,* supra, 482 U.S. at pp. 490-492; *Lagatree*, supra, 74 Cal. App. 4th 1105.)

Though the FAA preempts Labor Code section 229, there is a narrow exemption found in section 1 of the FAA. Section 1 exempts from FAA coverage "contracts of employment of…workers engaged in foreign or interstate commerce." (9 U.S.C. §1.) "Workers engaged in foreign or interstate commerce" has been held to mean "transportation workers." (*Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 121.) "Transportation workers" has been defined as workers "actually engaged in the movement of goods in interstate commerce" (*Cole v. Burns Int'l Security Services* (DC Cir. 1997) 105 F3d 1465, 1467; see *Harden v. Roadway Package Systems, Inc*. (9th Cir. 2001) 249 F3d 1137, 1140); however, the exemption is not so narrow as to apply only to those who actually, physically transport good across state lines. (*Palcko v. Airborne Express, Inc*. (3d Cir. 2004) 372 F.3d 588, 594.)

In the case at bench, Defendant argues that the FAA governs the contract at issue because Defendant engages daily in transactions involving interstate commerce, contracting with and buying from national and international companies; Defendant's drivers, including Plaintiff, must comply with federal laws and regulations and regularly traverse interstate highways and roads. Defendant argues further that Plaintiff fails to meet his burden in establishing that he is a "transportation worker" and thus exempt from the FAA. Plaintiff contends that the California Arbitration Act ("CAA") governs here

because Plaintiff is a driver engaged in interstate commerce, and is thus expressly exempt from the FAA.

Defendant's general business activities involve receiving shipments from other states and countries, storing same for a short period, then tasking employees such as Plaintiff with delivery of the goods to in-state customers. This is sufficient to show that Plaintiff's work involved transactions involving commerce, such that the FAA would apply. However, as Plaintiff's employment involved transporting goods received from out of state, the transportation worker exemption to the FAA applies. Accordingly, the FAA does not govern the contract at issue.

California Arbitration Act

The California Arbitration Act ("CAA") is similar to the FAA, however it differs in its application. Specifically, Labor Code section 229, which provides for the maintenance of actions for "the collection of due and unpaid wages claimed by an individual" without regard to a private agreement to arbitrate, is preempted by the FAA, but not by the CAA. (See *Lane*, supra, 224 Cal.App.4th at pp. 687–688; *Hoover v. American Income Life Ins. Co*. (2012) 206 Cal.App.4th 1193, 1207.)

Here, because Plaintiff has shown that he is a transportation worker and thus exempt from the FAA, the CAA governs. The CAA specifically provides that an action for wage and hour claims may be maintained despite an agreement to arbitrate. Plaintiff's complaint is, in its entirety, an action for wage and hour violations. Plaintiff's action may thus be maintained, regardless of the arbitration provision in the employment contract between Plaintiff and Defendant. Accordingly, Defendant's petition to compel arbitration is denied.

Defendant's objection to the declaration of Kenneth Yoon is sustained, the other objections are overruled.

Pursuant to California Rules of Court, rule 3.1312, and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 10/24/16

(Judge's initials) (Date)

Tentative Rulings for Department 502

(20) **Tentative Ruling**

Re: ***Capital Management Corp. v. Ochoa et al.***, Superior Court Case No. 16CECG00928

Hearing Date: **October 26, 2016 (Dept. 502)**

Motion: Plaintiff's Motion to Discharge Interpleader and Award Attorneys' Fees and Costs

Tentative Ruling:

To grant and sign the proposed order. Plaintiff will be awarded attorneys' fees and costs in the sum of $7,315.18.

Explanation:

Plaintiff seeks an order under Code of Civil Procedure section 386 discharging it from liability for funds deposited with the court and dismissing it from this action.

The court finds that plaintiff has complied with the requirements of section 386 and is entitled to be discharged from any further liability to defendants and dismissed from this action.

The only objection is to the amount of attorneys' fees sought, contending that fees and costs would have been less had plaintiff utilized the alternative procedure of Civil Code section 2924j(c), instead of interpleader. The court finds this contention of Estevan Ochoa to be speculative and not well taken in light of the fact that his apparent conduct of evading service was responsible in part for driving up the fees and costs. The amount of attorneys' fees and costs sought are quite reasonable for the work done.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 10/24/16
(Judge's initials) (Date)

Tentative Ruling

Re: ***Yslas v. Fresno Unified School District, et al.***, Superior Court Case No. 14CECG01277

Hearing Date: **October 26, 2016 (Dept. 502)**

Motion: Plaintiff's Motion to Continue Trial and Discovery Deadlines

Tentative Ruling:

To grant. Counsel are ordered to meet and confer, select a new trial date after April, 2017, and submit a stipulation and order for the court's signature.

Explanation:

The strong, overriding policy in the law is to resolve cases on their merits. Good cause is shown by the minor's long, excused, non-represented status and inability to complete discovery, the failure of prior counsel to provide the file, and the addition of a new party. No prejudice is shown. Defendant's claim that plaintiff did not request a continuance of the discovery cutoff is incorrect.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 10/25/16
(Judge's initials) (Date)

Tentative Rulings for Department 503

(19) **Tentative Ruling**

Re: ***First Mutual Group, LP v. Anneka Hall Appraisals***
Court Case No. 15CECG01699

Hearing Date: October 26, 2016 (Department 503)

Motion: by defendants to compel further response and production by plaintiff for defendants' Inspection Demand, Set No. 1.

Tentative Ruling:

To grant a further response to each demand at issue, with a verification which does not "allege" the truth of the answers, to be served by November 16, 2016. To grant sanctions but reduce the amount to $1,060.00, to be paid by the same day.

Explanation:

A mere statement that a party will produce all documents in its possession, custody, and control is incomplete unless such party can fully comply with the demand.

If it cannot, in full or in part, then the party "affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand. This statement shall also specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party. The statement shall set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item." Code of Civil Procedure section 2031.230.

If there are documents that plaintiff does not have which are responsive, then plaintiff need provide the further information required by the Code, along with the representation of a diligent search and reasonable inquiry.

The response to No. 5 is improper. It states that plaintiff will comply and that plaintiff cannot comply. This raises the question for each of the other demands, where plaintiff uniformly stated it would comply, of whether or not there are missing documents. That is defendant's argument.

A further response in compliance with the above is necessary. Whether or not plaintiff complies in full must be stated for all, and if plaintiff cannot do so, then it must follow section 2031.230 for those documents it does not have. Adherence to the requirements of the Code with regard to identification and providing a source for documents not in the plaintiff's possession can be particularly important in a case where plaintiff is claiming rights through an assignment, and might well not have all materials generated by the assigning party.

The verification states that the signing party "alleges" the responses are true. That is not acceptable. A verification on information and belief is fine, but it must affirmatively assert the truth of the answers, not "allege" them.

See Weil & Brown, Civil Procedure Before Trial, 8:1105: "The person designated to verify the corporation's knowledge may not have personal knowledge of ***all*** facts stated therein. (the entity is obliged to provide facts known to ***any*** agent or employee . . . Under such circumstances, 'information and belief' is the only realistic way to verify answers."

The form for verification comes from Code of Civil Procedure section 446, for verification of pleadings. It allows verification of the truth of the matters stated both on personal knowledge, or on information and belief, whichever is correct. (Exhibit 2 hereto, last page.) The law requires that several types of legal papers be filed with a verification that the contents are true and correct, either according to personal knowledge or information and belief. For example, petitions for writ of mandate must be under oath, so that the Court of Appeal is not misled. Code of Civil Procedure section 1086. Civil Code section 2984.4(c) requires an affidavit affirming venue under oath. Case law establishes that "verification" and "under oath" are interchangeable terms. See *Solberg v. Superior Court of San Francisco* (1977)19 Cal. 3d 182. 200. This is true for discovery proceedings as well. *Food 4 Less Supermarkets, Inc. v. Superior Court* (1995) 40 Cal. App. 4th 651.

Almost all the responses have the same content. The Court finds that seventeens hours of time for preparation of the motion is unreasonable; under the circumstances, four is sufficient, including responding to the reply and appearing at the motion. Sanctions are granted to moving party, but reduced to $1,060.00.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 10/25/16
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Samrai v. Samrahi***
Case No. 16 CE CG 02450

Hearing Date: October 26th, 2016 (Dept. 503)

Motion: Defendants Samrahi and Kaur's Demurrer to Complaint

Tentative Ruling:

To sustain the demurrer to the fifth cause of action in the complaint for failure to state facts sufficient to constitute a cause of action, with leave to amend. (Code Civ. Proc. § 430.10, subd. (e).)

Explanation:

In order to state a cause of action for fraud, plaintiff must allege that (1) defendants made a misrepresentation, (2) defendants knew of the falsity of the representation, (3) defendants intended to deceive plaintiffs, (4) plaintiffs reasonably relied on the representation and (5) plaintiffs suffered harm as a result. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.)

Also, "In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] 'Thus " 'the policy of liberal construction of the pleadings ... will not ordinarily be invoked to sustain a pleading defective in any material respect.' " [Citation.] [¶] This particularity requirement necessitates pleading facts which "show how, when, where, to whom, and by what means the representations were tendered." ' " (*Id.* at p. 645.) However, "Less specificity in pleading fraud is required 'when "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy...."' [Citation.]" (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1469.)

In the present case, plaintiffs allege the following facts to support their fraud claim. "During Defendants [*sic*] employment with Plaintiffs Defendants represented that Defendants were scheduling shipments/loads behalf of Plaintiffs." (Complaint, ¶ 48.) "Defendants representations were false, as Defendants were redirecting business to themselves for their personal gain. Further, despite the fact that Defendants represented they were responsible for collecting payment for carrier services provided [*sic*]." (*Id*. at ¶ 49.)

"Defendants made these false representations, they did so knowing the representations were false, and with the intent to defraud and deceive Plaintiffs." (*Id*. at ¶ 50.) "Defendants intended that Plaintiffs would rely on these false representations and Plaintiffs did, in fact, reasonably rely on Defendants' representations." (*Id*. at ¶ 51.) "As a result of Defendants' misrepresentations. Plaintiffs have been harmed in an

amount to be proven at trial, but not less than $500,000.00." (*Id*. at ¶ 52.) "Plaintiffs' reliance on Defendants' representation a substantial factor in causing Plaintiffs' harm." (*Id*. at ¶ 53.)

These allegations are insufficiently specific to support a fraud cause of action. Plaintiffs do not allege which defendant made the misrepresentations, when they were made, to whom they were made, or by what means they were made. Plaintiffs also allege no facts showing that their reliance on the representations was reasonable under the circumstances. The allegations supporting the claim are merely legal conclusions that are unsupported by any facts, so they are insufficient to support the fraud claim.

In addition, defendants argue that plaintiffs have not alleged facts supporting their conclusory allegations that defendants had knowledge of the falsity of their statements and intended to deceive plaintiffs. However, these facts would presumably be within the knowledge of defendants, so plaintiffs do not have to allege specific facts with regard to these elements of their fraud claim. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 217.)

However, since plaintiffs have not alleged any specific facts to establish the other elements of the fraud cause of action, the court intends to sustain the demurrer to the fifth cause of action. On the other hand, the court will grant leave to amend, since it is possible that plaintiffs may be able to allege more facts to support their claim.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 10/25/16
(Judge's initials) (Date)